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Whose Rights Matter More—Police Privacy or a Defendant's Right to a Fair Trial?

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WHOSE RIGHTS MATTER MORE—POLICE PRIVACY OR A DEFENDANT'S RIGHT TO A FAIR TRIAL?

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The function of the prosecutor under the federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of the people as expressed in the laws and give those accused of crime a fair trial.

– William O. Douglas[1]

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1. Donnelly v. DeChristoforo, 416 U.S. 637, 648–49 (1974) (Douglas J., dissenting). During Justice Douglas' thirty-six years on the bench he was accused of judicial activism and remained a controversial figure throughout his tenure. Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 133 (1991). He is credited with resurrecting the Equal Protection Clause and eventually pushing the Court toward the holding in *Brown v. Board of Education*. *Id.* at 144, 153.

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I. INTRODUCTION

The fight over fair trials has hit the streets. In 2020, there has been constant strife over whether law enforcement is committed to protecting the public and guaranteeing fair administration of justice. There are no simple answers to the question of balancing a defendant's right to a fair trial against the interests of law enforcement. This tension has arisen in many contexts—from the struggle over the excessive force to challenges to police privacy. In the context of a defendant's right to a fair trial, the key to finding the right balance has been provided by the California Supreme Court itself. Under the Sixth Amendment, defendants are entitled to exculpatory evidence as a matter of due process. While some of this exculpatory evidence might also embarrass or challenge the work of law enforcement officers, the rights of defendants must prevail. The case of *Association for Los Angeles Deputy Sheriffs v. Superior Court* (*ALADS*)[2] is about that balance.

In authoring the California Supreme Court's unanimous decision, Chief Justice Cantil-Sakauye identifies the critical issue: "This case concerns the relationship between prosecutors' constitutional duty to disclose information to criminal defendants and a statutory scheme that restricts prosecutors' access to some of that information."[3] Even the articulation of the key tension in this case reflects a critical, underlying problem with law enforcement—officers see their interests independent of the criminal justice system. To the extent the justice system wants to protect a defendant's right to due process, law enforcement takes the view that the defendant's interests are, at times, subservient to the interests of law enforcement. While that may be true when safety issues are at stake—and even then, a defendant's rights should be respected—the notion that a defendant's right to a fair trial could be compromised because of officers' privacy rights seems fundamentally unjust. Yet, that is the system that has been created in California and it is a system that must be critically examined, as it was in the *ALADS* decision. The court's decision began the discussion. It is up to those who are committed to a fair trial to continue that conversation and usher in a new era where it doesn't take a supreme

2. 447 P.3d 234 (Cal. 2019).
3. *Id.* at 238–39.

court decision to ensure that the balance goes to a defendant's right to a fair trial.

Part I of this Article sets forth the framework of the debate over the proper balancing of defendants' rights to a fair trial and protection of law enforcement officers' rights of privacy.[4] After discussing the background of the case, including the facts and issues set forth in *ALADS*, this first section analyzes the critical right of a defendant to exculpatory evidence and how that right has been compromised over the years by the byzantine approach of requiring defendants to file special *Pitchess* motions to get access to information in police officers' files that could help the defense.

Part II addresses why the court really had no choice, under constitutional principles, to issue a ruling in favor of disclosure of the officers' confidential personnel files. If the justice system's commitment to defendants' due process rights is sincere in the least, then the balance between officers' rights of privacy and the right to a fair trial must fall in favor of fair trials.

Part III discusses why recent legislative changes not only trump the court's decision, but also reflect a newfound energy among the populace to bring fairness to the criminal justice system in a manner that is bolder, more effective, and less cumbersome than the approach by the court in *ALADS*. In 2018, while the *ALADS* case was pending,[5] the California legislature passed Senate Bill (SB) 1421, The Right to Know Act.[6] It gives the public the right, under the California Public Records Act, to see records relating to police misconduct and serious uses of force.[7]

Together, the *ALADS* decision and SB 1421 may usher in a new era of police accountability. They couldn't have come too soon. The public has long been frustrated with the seemingly impenetrable wall built around police officers. Even apart from the laws that protect

4. While this Article focuses on the privacy interests of peace officers, similar issues can arise in the disclosure of other public employee records under the California Public Records Act. *See generally* Alexandra B. Andreen, Comment, *The Cost of Sunshine: The Threat to Public Employee Privacy Posed by the California Public Records Act*, 18 CHAP. L. REV. 869 (2015) (explaining that California courts have favored the disclosure of public employee records, such as complaints about public employees, employee investigative reports, pay data and salary information, retirement benefits and pension data, and personnel disciplinary documents).

5. In its decision, the California Supreme Court acknowledged the passage of Senate Bill 1421 and its impact on one of the statutes in question. *ALADS*, 447 P.3d at 241.

6. S.B. 1421, 2017–2018 Reg. Sess. (Cal. 2018).

7. *See id.*

officers' privacy, doctrines such as qualified immunity[8] and the "good faith exception" to the exclusionary rule[9] have for years protected officers from being held accountable for this misconduct. The 2020 protests throughout America[10] affirm the public's support for the California Supreme Court's approach in *ALADS*. It is a decision that provides a window into the future of police accountability.

II. *ALADS*: WHAT WAS AT STAKE?

The *ALADS* case arose when the Deputy Sheriffs' Association sought a preliminary injunction to prevent the Los Angeles Sheriff's Department from disclosing the identity of officers who had been identified as committing administrative violations ranging from tampering with evidence, to providing false information against defendants, to engaging in unreasonable use of force and discriminatory harassment.[11] The Sheriff's Department had created a

8. Qualified immunity is a judicially developed doctrine that provides immunity to executive officials "for violating constitutional principles that they could not have reasonably known." Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 185 (2008). The Supreme Court has continuously reaffirmed qualified immunity because it "protect[s] government officials from financial liability" and guards against "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 14 (2017) (second alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

9. In order to trigger the exclusionary rule, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 555 U.S. 135, 144 (2009). However, the exclusionary rule has a good faith exception: it does not apply if the police acted in "objectively reasonable reliance" on mistaken information. *Id.* at 142. The test for this exception is whether a "'reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Id.* at 145 (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).

10. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html; Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html; Lara Putnam et al., *The Floyd Protests Are the Broadest in U.S. History—and Are Spreading to White, Small-Town America*, WASH. POST BLOGS (June 6, 2020, 6:11 AM), https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america/.

11. *ALADS*, 447 P.3d 234, 239–40 (Cal. 2019). According to the record in the case, the list of administrative violations included: (1) "Immoral Conduct"; (2) "Bribes, Rewards, Loans, Gifts, Favors"; (3) "Misappropriation of Property"; (4) "Tampering with Evidence"; (5) "False Statements"; (6) "Failure to make Statements and/or Making False Statements During Departmental Internal Investigations"; (7) "Obstructing an Investigation/Influencing a Witness"; (8) "False Information in Records"; (9) "Policy of Equality—Discriminatory Harassment"; (10) "Unreasonable Force"; and (11) "Family Violence." *Id.* at 240.

"*Brady* list" of these officers' names and their misconduct.[12] The information in those records was precisely the type of information that must ordinarily be disclosed to defendants in criminal cases under the *Brady* doctrine.[13] However, the Sheriffs' Association sought to ban their disclosure as violating the officers' right to privacy.[14] Citing the so-called *Pitchess* statutes,[15] the Sheriffs' Association claimed that the Sheriff's Department was barred from releasing the information without a court order.[16]

Under the United States Supreme Court's decisions in *Brady v. Maryland*[17] and *Giglio v. United States*,[18] prosecutors must disclose to the defense both exculpatory evidence and evidence that can be used to impeach a law enforcement officer's testimony.[19] Prosecutors have this duty even if they are not personally aware that the evidence exists.[20] Prosecutors are responsible for the exculpatory and impeachment information in law enforcement files—the very type of information the Sheriffs recorded on their "*Brady*" lists.[21] The

12. *Id.* at 239.

13. *Id.*

14. *Id.* at 240.

15. CAL. PENAL CODE § 832.7(a) (Deering 2020) makes confidential certain personnel records of citizens' complaints, as well as information "obtained from" those records. Until the *ALADS* decision, defendants could only obtain those records when they filed a motion showing good cause, and a court would conduct an in camera inspection of the confidential information to determine whether it needed to be disclosed. *See* Pitchess v. Superior Ct., 522 P.2d 305, 307 (Cal. 1974), *superseded by statute*, Act of Feb. 22, 1974, ch. 29, 1974 Cal. Stat. 42, 42–43 (codified as amended at CAL. PENAL CODE § 832.5 (Deering 2020)); *see also* People v. Superior Ct., 377 P.3d 847, 857 (Cal. 2015) (holding that the prosecution must comply with the procedures of *Pitchess* "if it wishes to obtain information from confidential [peace officer] personnel records"); 1 BRIAN M. HOFFSTADT, CALIFORNIA CRIMINAL DISCOVERY § 12.08 (5th ed. 2019) (a complete analysis of *Pitchess* and motions filed under it).

16. *ALADS*, 447 P.3d at 239–40.

17. 373 U.S. 83 (1963) Defendant Brady and companion, Boblit, were both charged with first degree murder and sentenced to death. Defendants were tried separately. Prior to trial, Brady's defense counsel had asked the prosecution for Boblit's statements. However, the prosecution withheld a statement in which Boblit admitted to the homicide. Brady moved for a new trial due to this undisclosed evidence. *Id.* at 84. Under *Brady*, evidence must be disclosed to the defense, even without a defense request, if the evidence is favorable to the accused. Failure to do so violates a defendant's right to a fair trial, even if the prosecution's failure to disclose is inadvertent. So long as the evidence is "material" to the defense, it must be disclosed. *See* Laurie L. Levenson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. DISCOURSE 74, 77 (2013).

18. 405 U.S. 150 (1972).

19. *See generally* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1437–38 (2011) (describing the nature of impeachment evidence and a prosecutor's duty to disclose).

20. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

21. *See* Ryan T. Cannon, Note, *Reconciling* Brady *and* Pitchess: Association for Los Angeles Deputy Sheriffs v. Superior Court*, and the Future of* Brady *Lists*, 55 SAN DIEGO L. REV. 729, 736

Sheriff's Department recognized this,[22] but the Sheriffs' Association still contested disclosure, claiming that *Brady* rights were limited by the officers' privacy rights.[23]

The trial court in *ALADS* agreed with the Sheriffs' Association that the identity of peace officers was confidential, but did not enjoin the Department from disclosing the fact that an individual Deputy Sheriff is listed on the "*Brady* list" when a criminal prosecution was pending and the Deputy Sheriff was a potential witness.[24] The court of appeal granted a writ of mandate by the Sheriffs' Association and an immediate stay.[25] It held that disclosure could only be made after a *Pitchess* motion is filed, heard, and granted.[26] The process dictated by *Pitchess* makes it extremely difficult for defendants to obtain information regarding officers unless they already have a "good faith"

(2018) [hereinafter Cannon, *Reconciling* Brady *and* Pitchess] (Brady lists are lists compiled by prosecutors or police agencies of the names of witnesses, including law enforcement officers, who have information in their backgrounds that should be disclosed as impeachment evidence for the defense).

22. In a letter that the Sheriff's Department sent to its deputies, it advised them that "in order to comply with our constitutional obligations, [the Department is] required to provide the names of employees with potential exculpatory or impeachment material in their personnel file to the District Attorney and other prosecutorial agencies where the employee may be called as a witness." *ALADS*, 447 P.3d 234, 240 (Cal. 2019).

23. *Id.* There is a long history of the fight in Los Angeles between law enforcement and those seeking more access to the records of police and sheriff officers. In 1974, the California Supreme Court held, in *Pitchess v. Superior Court of Los Angeles County*, that criminal defendants could access peace officer personnel records. 522 P.2d 305 (Cal. 1974), *superseded by statute*, Act of Feb. 22, 1974, ch. 29, 1974 Cal. Stat. 42, 42–43 (codified as amended at CAL. PENAL CODE § 832.5 (Deering 2020)). In response to the decision, law enforcement unions and prosecutorial offices lobbied fiercely against such intrusions on law enforcement privacy. *See* Katherine J. Bies, Note, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 130 (2017). However, they went beyond objecting to access to police files. Some departments even began shredding their records. *See id.* at 127. Critics began to highlight the problem in the choices being made by the public. *See, e.g.*, Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). The net result was the enactment of CAL. PENAL CODE § 832.7 (Deering 2020) ("Police Officer's Bill of Rights"). Until *ALADS* was decided, the *Pitchess* procedure was used to limit disclosures of police misconduct. *See Pitchess*, 522 P.2d at 305.

24. *ALADS*, 447 P.3d at 240.

25. *Id.*

26. *Id.* at 241. There was a dissent by Justice Elizabeth Grimes who believed a *Pitchess* motion is not required to transfer to the prosecution team the identities of officers who may have *Brady* materials in their personnel records. Ass'n for L.A. Deputy Sheriffs v. Superior Ct., 221 Cal. Rptr. 3d 51, 80–99 (Ct. App. 2017) (Grimes, J., concurring in part and dissenting in part) (arguing that a *Pitchess* motion is not required to transfer to the prosecution team the identities of officers who may have *Brady* materials in their personnel records), *rev'd*, 447 P.3d 234 (Cal. 2019).

basis for believing the officers have engaged in misconduct.[27] Even then, information was limited to records from the past five years.[28] For most defendants, a *Pitchess* motion was an act of futility because of the procedural barriers to procuring the information. Without shifting the burden to law enforcement to be forthright regarding an officer's background, individual defendants frequently faced an insurmountable obstacle to obtaining information.

In deciding *ALADS*, the California Supreme Court finally came to terms with how the obstacles under *Pitchess* compromised defendants' due process rights. It began its decision by noting that the heart of the issue raised by the case is a defendant's Fourteenth Amendment right to due process of law.[29] While no one disputed that the *Pitchess* procedure and state laws were designed to protect the confidentiality of law enforcement officers' records, the key issue was whether that interest should prevail when prosecutors need such information to comply with their constitutional duties under *Brady* and *Giglio*.[30]

Ultimately, the court concluded that the confidentiality created by the *Pitchess* statutes does not forbid disclosure to prosecutors of *Brady* alerts.[31] In an important recognition that the time has come to

27. In order to obtain information from an officer's personnel records, a moving party must first file a written motion with documentation that makes a prima facie showing that there is "good cause" to have the court conduct an in camera review of the files for any documents on point. CAL. EVID. CODE § 1043(b)(3) (Deering 2020). The moving party must show good cause, which requires stating "upon reasonable belief that the governmental agency identified has the records or information from the records" and the information is material to the underlying proceeding. *Id.* Once the movant establishes good cause, the court must conduct an in camera review of the officer's personnel records for "information [that] is relevant to the subject matter involved in the pending litigation." HOFFSTADT, *supra* note 15, § 12.10 (alteration in original). After the review, the court may rule that the personnel file contains relevant information and order the agency possessing the records to disclose them to the movant. *Id.* § 12.11. Disclosure can take place over two phases: In the first phase, "[t]he court should order the agency to disclose the name, address, and telephone number of the individuals who have witnessed or complained of the prior officer misconduct." *Id.* If that disclosure "'proves insufficient,' a court may then order the disclosure of the witness's full statements or the underlying complaints, reports or other documentation." *Id.* (quoting Rezek v. Superior Ct., 141 Cal. Rptr. 3d 891, 896 (Ct. App. 2012)). The court must also order that "the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." CAL. EVID. CODE § 1045(e).

28. CAL. EVID. CODE § 1045(b)(1).

29. *ALADS*, 447 P.3d at 241.

30. *Id.* at 239.

31. *Id.* at 248. The Chief Justice wrote: "Viewing the *Pitchess* statutes 'against the larger background of the prosecution's [*Brady*] obligation,' . . . we instead conclude that the Department may provide prosecutors with the *Brady* alerts at issue here without violating confidentiality." *Id.* at 249 (first alteration in original) (citation omitted).

recognize how important access to law enforcement officers' files can be to a defendant's fair trial, the court held that *Pitchess* statutes must be viewed "against the larger background of the prosecution's [*Brady*] obligation."[32] "Because confidential records may contain *Brady* material, construing the *Pitchess* statutes to permit *Brady* alerts best 'harmonize[s]' *Brady* and *Pitchess*."[33] "[T]o cut off the flow of information from law enforcement personnel to prosecutors would be anathema to *Brady* compliance."[34]

The 2020 protests on the streets regarding police misconduct are an important reminder of why there needs to be more transparency regarding police officers' backgrounds. The officer charged with murder for his excessive force against George Floyd had a record of using excessive force.[35] Officers convicted in the notorious Rampart Scandal had prior records of misconduct.[36] Giving prosecutors—and thereby the defense—information regarding officers not only provides an individual defendant the right to a fair trial, but is an important tool in ferreting out problem officers before irreparable harm is done.

While the due process right for defendants is enshrined in the U.S. Constitution, statutes protecting police officer privacy are relatively recent. The first "Law Enforcement Officers Bill of Rights" was adopted in the 1970s.[37] In the decades it has existed, it has frustrated those who sought police reform. Police Bills of Rights across the

32. *Id.* at 244 (quoting People v. Mooc, 36 P.3d 21, 28 (Cal. 2001)).

33. *Id.* at 249 (alteration in original).

34. *Id.* At the same time that the California Supreme Court embraced greater disclosure, state officials and the State Bar did likewise. California Attorney General Kamala Harris issued Opinion No. 12-401, which approved of a *Brady* list policy proposed by the California District Attorneys Association. *See* 98 Ops. Cal. Att'y Gen. 54 (2015). In 2018, the State Bar of California proposed Rule 3.8 of the California Rules of Professional Conduct (Special Responsibilities of Prosecutors) that was adopted by the California Supreme Court and became effective on November 1, 2018. *See* Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 758 (2018). That rule includes a requirement that prosecutors disclose all evidence known or unknown to the prosecutor that might negate the guilt of the accused or mitigate the sentence. *See id.* at 756. As with the *ALADS* decision and SB 1421, the adoption of Rule 3.8 involved considerable political maneuvering by those with a stake in the new rule. *See id.*

35. Derek Hawkins, *Officer Charged in George Floyd's Death Used Fatal Force Before and Had History of Complaints*, WASH. POST (May 29, 2020, 3:47 PM), https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/.

36. Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG. (Oct. 1, 2000), https://www.nytimes.com/2000/10/01/magazine/one-bad-cop.html.

37. *See* Rebecca Tan, *There's a Reason It's Hard to Discipline Police. It Starts with a Bill of Rights 47 Years Ago.*, WASH. POST (Aug. 29, 2020, 5:00 AM), https://www.washingtonpost.com/history/2020/08/29/police-bill-of-rights-officers-discipline-maryland/.

country have routinely blocked investigations and emboldened police misconduct.[38] The decision in *ALADS* was a timely pushback on this fifty-year trend.[39]

III. MAKING A CHOICE: CHOOSING THE RIGHT TO A FAIR TRIAL

The California Supreme Court was on firm ground in reaching its decision that the balance of rights must favor defendants in our criminal justice system. Since the 1960s, prosecutors have had the obligation to provide exculpatory and impeachment information to the defense.[40] Yet, fulfilling that obligation was difficult when the very information that needed to be disclosed was not in the hands of the prosecution. In making law enforcement records confidential, the legislature had not taken into account prosecutors' discovery obligations.[41]

Nor did the legislature anticipate how far law enforcement might go to protect the confidential files of its rank and file officers. Seeking an injunction to prevent disclosure was one of the more modest efforts by the police unions. Previously, there had been efforts to shred and conceal police records.[42] "In one particularly dramatic episode, the Los Angeles City Attorney and the LAPD conspired to shred records of complaints against officers as a way of preventing discovery. The LAPD covertly destroyed four tons of police files during a single month in 1976."[43]

Thus, while the California Supreme Court wanted to honor the *Pitchess* procedure and confidentiality interests of officers as set forth in Penal Codes §§ 832.7 and 832.8 and Evidence Codes §§ 1043–

38. *Id.* ("[T]he Law Enforcement Officers' Bill of Rights has been one of the biggest obstructions to police accountability, hindering investigations and shielding misconduct from public scrutiny.").

39. The focus of the decision was, of course, only on California's law enforcement agencies. Yet, given that California has one-tenth of all the officers in the United States (about eighty thousand police officers), Bulletin, Brian A. Reaves, U.S. Dep't of Just., Census of State and Local Law Enforcement Agencies, 2008, at 15 app. tbl.6 (July 2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf, it is likely to have an impact beyond California's borders as other states evaluate how to address the issue of disclosing police misconduct. For example, even as the *ALADS* case was ongoing, New Hampshire, Colorado, Vermont, and Maine faced similar issues. *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 766–70 (2015). Moreover, the cry for public access spread across the country—far beyond the actual *ALADS* litigation. *Id.* at 770–71.

40. Abel, *supra* note 39, at 752.

41. *See id.* at 763.

42. *See* Bies, *supra* note 23, at 127.

43. Cannon, *Reconciling* Brady *and* Pitchess, *supra* note 21, at 734.

1045, the Court was fully aware that there was no limit to how far some law enforcement groups would go to prevent disclosure. When it comes to balancing, a court must consider how much room there is for trusting both sides to honor their obligations under the federal Constitution. Law enforcement gave the court little reason to believe that a more nuanced approach would succeed in protecting defendants' rights. The Sheriffs' Association wrapped itself in a series of decisions regarding police privacy.[44] They did so even though the Sheriff's Department itself had created and kept the *Brady* lists, in recognition that there was a significant constitutional right at stake.

Thus, by the time the California Supreme Court decided *ALADS*, the choice was clear. The court could continue to strengthen officers' privacy under the *Pitchess* laws or open the door to require law enforcement help ensure that defendants receive fair trials. The court let the door swing open.

Although the *ALADS* decision focuses on a defendant's discovery rights, the ultimate balance was between a defendant's right to a fair trial[45] and an officer's right to privacy. More accurately, it was between the practical need to protect officers from scrutiny versus a defendant's right to a fair trial. As the court and society became more willing to closely scrutinize police behavior, the officers' interest in privacy sank in comparison to a defendant's right to a fair trial. It would be odd for the court to reach a decision that constrained law enforcement from protecting a defendant's right to a fair trial.

IV. MOVING BEYOND THE COURTS: LEGISLATING ACCESS TO POLICE FILES

The *ALADS* case was litigated for almost four years. During that time, frustration grew over the lack of accountability by law enforcement and the inability to obtain information regarding police misconduct.[46] State Senator Nancy Skinner first introduced SB 1421[47]

44. The appellate court relied on a series of cases known as the "*Copley Press*" cases. *Id.* at 739. As news agencies sought police records under the California Public Records Act, the Court held that *Pitchess* confidentiality extended beyond criminal and civil proceedings to third party disclosures. *Id.* at 739–40. In other words, it cut off other avenues for seeking police accountability.

45. In *Brady v. Maryland*, Justice Douglas linked the right to discovery to the right to a fair trial in stating, "[s]ociety wins . . . when criminal trials are fair." 373 U.S. 83, 87 (1963).

46. *See* Liam Dillon, *California Legislature Passes Major Police Transparency Measures on Internal Investigations and Body Cameras*, L.A. TIMES (Sept. 1, 2018, 3:25 PM), https://www.latimes.com/politics/la-pol-ca-police-transparency-bill-passes-20180831-story.html.

47. For purposes of this Article, the key provisions of SB 1421 were: Sec. 1(b):

on February 16, 2018.[48] Prior to her election to the California State Senate, Skinner was a member of the California State Assembly for six years.[49] She represented Californians living in the Berkeley area of California,[50] a district known for social action and a willingness to take the lead on social justice reforms. In 2016, Skinner was elected to the State Senate.[51] While in office, she served on the Senate's Public Safety Committee.[52]

By the time Skinner introduced SB 1421, she was no newcomer to criminal justice reforms.[53] She had authored reforms of the detention on foster youth, unfair incarceration of youth, and the need for funding reentry programs.[54] She had moved to close the loophole in California's assault weapons ban and spoke openly about the problems with policing in California.[55] As she stated in her press

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> The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

Sec. 2(b)(1):

> Notwithstanding [other provisions of law], the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act . . . :
>
> (A) A record relating to the report, investigation, or findings of any of the following: . . . An incident involving the discharge of a firearm at a person by a peace officer or custodial officer. . . . An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury. . . .
>
> (B)(i) Any record relating to an incident . . . [involving an officer's sexual assault]. . . .
>
> (C) **Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filling false reports, destruction, falsifying, or concealing of evidence.**

S.B. 1421, 2017–2018 Reg. Sess. (Cal. 2018) (emphasis added).

48. CAL. STATE S., HISTORY OF SENATE BILL NO. 1421, 2017–2018 Reg. Sess. (Cal. 2018).

49. *Senator Nancy Skinner: Biography*, CAL. STATE SENATE DEMOCRATIC CAUCUS, https://sd09.senate.ca.gov/biography (last visited Nov. 22, 2020).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.*; Press Release, Senator Nancy Skinner, Senator Skinner Introduces SB 1421 to Open Law Enforcement Records (Apr. 2, 2018), https://sd09.senate.ca.gov/news/20180402-

release upon the introduction of SB 1421, "[b]uilding trust between police and communities has to start with transparency . . . . SB 1421 ensures that when officers use serious or deadly force, engage in sexual assault or are dishonest in carrying out their duties, the public is informed."[56] The fundamental basis for the new law was that the legitimacy of our very criminal justice system depends on holding bad officers accountable and enabling civilians to have fair trials—whether criminal cases or civil rights actions against police—by having access to the information that reveals police misconduct.

Some of the provisions of SB 1421 addressed public access to law enforcement agency records related to the discharge of a firearm and to coercing an individual into having sex. However, the provision that most overlapped with *Brady* was that which allowed access to records showing a law enforcement officer's dishonesty in reporting, investigating, or prosecuting a crime. It is this provision that is crucial in giving defendants access to information that may help defend themselves when there is a possibility that an officer involved in their case was dishonest or handled evidence or witnesses in the case dishonestly.

It took seven months for SB 1421 to make its way through the legislative process.[57] Notwithstanding the strength of the police unions,[58] the California legislature and Governor Jerry Brown adopted this crucial law.[59] The importance of having a change in the law come from both the judicial and legislative branches cannot be overstated. Courts are frequently blamed for being too judicially active. The California Supreme Court, in particular, has been thrown into the middle of political debates, as it was in the time of Chief Justice Rose

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senator-skinner-introduces-sb-1421-open-law-enforcement-records [hereinafter Senator Nancy Skinner Press Release].

56. Senator Nancy Skinner Press Release, *supra* note 55.

57. CAL. STATE S., HISTORY OF SENATE BILL NO. 1421, 2017–2018 Reg. Sess. (Cal. 2018).

58. Police unions fiercely argued against the passage of SB 1421, claiming that making records of internal misconduct investigations public would further punish officers and "override the ability of departments to set their own rules for disclosure." Dillon, *supra* note 46; *see* Darwin BondGraham, *California Police Unions Fight New State Law Promising Transparency on Misconduct Records*, THE APPEAL (Feb. 20, 2019), https://theappeal.org/california-police-unions-fight-new-state-law-promising-transparency-on-misconduct-records/ (discussing police union opposition to SB 1421 and subsequent legal fights after the passage of the bill to restrict the law from being applied retroactively to older records).

59. HISTORY OF SENATE BILL NO. 1421.

Bird.[60] Major reforms in the criminal justice system must be accompanied by both judicial and legislative support. Rather than a new ethos being forced on the public, this dual acceptance of change reflects a fundamental shift in the balance between police officers' interests and those of the public, including criminal defendants. Accordingly, while SB 1421 did not focus exclusively on *Brady* rights, its acknowledgment that it is crucial that police departments disclose dishonesty and misconduct that could affect a defendant's right to a fair trial provides firm support that the California Supreme Court's balancing in *ALADS* was aligned with the values of Californians.

V. A NEW ERA AND THE WORK THAT STILL NEEDS TO BE DONE

Both the *ALADS* decision and SB 1421 were vital to initiating crucial reforms in California's criminal justice system. However, there is still much more work to be done. First and foremost, there is the need to convince law enforcement that it is really in their best interest to have such transparency regarding their actions. Historically, access to police misconduct records has been forged through adversarial actions.[61] While some might say the public has now "won" in the struggle between police privacy rights and disclosure of their misconduct, this basic paradigm must be changed to ensure real reform. Law enforcement must embrace a system in which there is accountability to the public for police errors and dishonesty.

Changing the culture of any institution is not easy. It involves hiring officers who understand and agree to abide by a system that will hold them accountable to the public at large for their misdeeds. No longer can the police department be a special club that will hide or tolerate their misdeeds; rather, there must be greater accountability to the public as a whole. It is important to impress on the rank and file police, as well as their supervisors, that the rhetoric of the "law and order" eras should no longer control their behavior. Police officers' "Bills of Rights" were introduced in reaction to reforms of the 1960s

60. *See* Cynthia Gorney, *Rose Bird and the Court of Conflict*, WASH. POST (Apr. 8, 1986), https://www.washingtonpost.com/archive/lifestyle/1986/04/08/rose-bird-and-the-court-of-conflict/d391da7f-33dd-4fa5-87b2-a7c79e62e048/; Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES (Dec. 6, 1999), https://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html.

61. William Finnegan, *How Police Unions Fight Reform*, THE NEW YORKER (July 27, 2020), https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform.

in an effort to shift more power to the police.[62] Today, the push is toward greater restraints on the police and more accountability to the courts and the people. It is natural, therefore, that the balance should shift to openness.

Perhaps more importantly, officers must be trained to understand why it is in their best interest to be part of an open institution. There are, in fact, several benefits to the officers themselves. For example, officers who scrupulously honor defendants' rights and follow the rules will not view themselves as outsiders, but as leaders of their institution. Additionally, officers and their supervisors need not decide for themselves when there needs to be disclosure of problems in their past cases.[63] With appropriate disclosure rules, officers are not put in the tough position of deciding whether their allegiance is to fellow officers or to the public. Knowing that they have an official duty to serve the interests of the public, including criminal defendants, will make it less likely that officers are pushed toward covering up misconduct by themselves or other officers.

There is yet another benefit to law enforcement officials in embracing *ALADS* and SB 1421. In order for prosecutors and law enforcement to be successful in prosecuting cases, jurors must have confidence in the testimony of law enforcement officers.[64] Much has been written about the issue of "testilying"[65] and its impact on making

62. Tan, *supra* note 37.

63. *Brady* decisions made by those law enforcement personnel who are most affected by the disclosure are inherently suspect. Even when there is a good faith effort, police agencies typically have a difficult time identifying what sort of misconduct should be disclosed. Abel, *supra* note 39, at 796–97. Under the *Pitchess* system advocated by the police in *ALADS*, judges were also ill-equipped to evaluate the relevance of police misconduct given the limited information they may have regarding a case. *Id.* at 763. Thus, a system, such as that in SB 1421, better ensures the disclosure of all relevant impeachment information.

64. Traditionally, it was believed that judges and juries were predisposed to trust officers when their credibility was pitted against the credibility of a criminal defendant. *Id.* at 795. Yet, that assumption may no longer apply. *See* Sara Kropf, *Why Judges Should Stop Asking Jurors About Police Officer Witnesses During Voir Dire*, GRAND JURY TARGET (May 15, 2019), https://grandjurytarget.com/2019/05/15/why-judges-should-stop-asking-jurors-about-police-officer-witnesses-during-voir-dire/. Studies have shown a strong correlation between jurors' view of the credibility of officers and their trust and overall confidence in the prosecution's case. *See* Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 704 (2016).

65. "Testilying" is when law enforcement officers testify falsely in criminal cases, including during pretrial matters involving the suppression of evidence. Larry Cunningham, *Taking on Testilying: The Prosecutor's Response to In-Court Police Deception, in* CRIME & JUSTICE IN AMERICA: PRESENT REALITIES AND FUTURE PROSPECTS 223, 223 (Wilson R. Palacios et al. eds., 2nd ed. 2002) ("The term 'testilying' . . . usually refers to perjury committed by police officers.");

judges and jurors increasingly skeptical of the credibility of law enforcement witnesses.[66] Increased disclosure of the background of police officers will help jurors identify those officers who might be lying[67] and give more credence to the testimony of other officers who do not have problematic backgrounds. Accordingly, when officers testify, jurors can have greater confidence in their credibility when there have not been any revelations of misconduct.

Finally, officers take an oath to not "betray their integrity, character or public trust."[68] One benefit to increasing accountability for police misconduct is the assurance that those officers who abide by the rules are meeting their oath and professional responsibility. To the extent officers can cite to this increased standard of

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Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html (noting that behind closed doors, false testimony by the police is called testilying); Brian Dickerson, *Cops on the Witness Stand Face More Skeptical Juries*, DETROIT FREE PRESS (July 5, 2015, 12:22 PM), https://www.freep.com/story/opinion/columnists/brian-dickerson/2015/07/04/cops-witness-stand-face-skeptical-juries/29676921/ ("[A] seemingly unrelenting barrage of video images depicting police at their worst has taken a toll on uniformed officers' credibility, on the street and in the courtroom."). *See generally* I. Bennett Capers, *Crime, Legitimacy and Testilying*, 83 IND. L.J. 835 (2008) (discussing the origins, history, impacts, and solutions to "testilying"); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996) (discussing the nature and causes of testilying, and proposals for curtailing it).

66. The overwhelming trust in the credibility of police officers has been eroded and is now under increased scrutiny by the public. *See* Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, SLATE (Aug. 4, 2020, 11:51 AM), https://slate.com/news-and-politics/2020/08/police-testilying.html; Rigodis Appling & Jason Wu, *Why Blue Lies Matter: It Is Everyone's Business When Police Fail to Tell the Truth*, N.Y. DAILY NEWS (July 3, 2020, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-blue-lies-matter-20200703-sgs6rzgidfaztp25jfv3x2iuta-story.html; *see also* Lindsey M. Cole, *In the Aftermath of Ferguson: Jurors' Perceptions of the Police and Court Legitimacy Then and Now, in* CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW 109, 109 (Cynthia J. Najdowski & Margaret C. Stevenson eds., 2019) (discussing the eroding legitimacy with which jurors and society view police).

67. *See* Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1362–63 (2018) (to assess credibility of police officers, we need greater recordkeeping and transparency of police misconduct records).

68. Each police department has its own oath. However, many of them are similar to that of the International Association of Chiefs of Police's "Law Enforcement Oath of Honor." It reads: "On my honor, I will never betray my integrity, my character or the public trust. I will always have the courage to *hold myself and others accountable for our actions*. I will maintain the highest ethical standards and uphold the values of my community, and the agency I serve." Law Enforcement Oath of Honor, Int'l Ass'n of Chiefs of Police, https://www.theiacp.org/sites/default/files/all/i-j/IACP_Oath_of_Honor_En_8.5x11_Web.pdf (last visited Nov. 22, 2020) (emphasis added). Many police departments have a set of "Core Values" that are designed to direct the actions of their officers. Included in those core values is a commitment to integrity in "all we say and do." *See, e.g.*, *Core Values of the LAPD*, L.A. POLICE DEP'T, https://www.lapdonline.org/inside_the_lapd/content_basic_view/845 (last visited Nov. 22, 2020).

professionalism, it may engender more pride and satisfaction in their career work.

Both the *ALADS* decision and SB 1421 provide mechanisms to address police misconduct. However, the focus of both is to hold officers accountable for past misconduct and ensure that any such misconduct is either addressed by civil remedies or can be used by defendants when criminally charged.[69] While both are critically important, it should also be the justice system's goal to prevent police misconduct in the first place. This will require that officers embrace the need to refrain from excessive force, discrimination, dishonesty, and other misconduct. Disclosure on *Brady* lists or through SB 1421 might be a deterrent for future misconduct, but it is unlikely to be a magic cure.

For real institutional change, it is critical that law enforcement officers be trained so that they are consciously aware that their misconduct will not be covered up. Just as we must train officers not to be overly aggressive,[70] officers must be trained to appreciate why even small falsehoods in their reports—whether by them or witnesses—are antithetical to the cause of justice. Even if there is an inclination to make the facts fit the officer's intuition that the defendant is guilty, *ALADS* and SB 1421 must be cited as a basis for officers to resist this temptation and guard against such actions. It is not a defense to dishonest behavior that an officer truly believed the defendant was guilty. That is not a decision officers get to make. Their job is to compile the evidence, in an honest fashion, so that the trier of fact—judge or jury—can make that decision.

True reform is not easy and requires a range of systemic changes, including more transparency regarding the work and agenda of police and prosecutorial organizations.[71] Unless they embrace more accountability, it will be difficult for individual defendants or judges to ensure compliance with *Brady* and other disclosure laws. Traditionally, police unions have fought against reform.[72] The *ALADS*

69. *See ALADS*, 447 P.3d 234, 239 (Cal. 2019); S.B. 1421, 2017–2018 Reg. Sess. (Cal. 2018).

70. *See* Joshua Holland, *Are We Training Cops to Be Hyper-Aggressive 'Warriors'?*, THE NATION (Nov. 10, 2015), https://www.thenation.com/article/are-we-training-cops-to-be-hyper-aggressive-warriors/.

71. Police unions exert considerable pressure on their rank and file and the *Brady* process, which makes implementing reforms more difficult. *See* Abel, *supra* note 39, at 788–89.

72. Finnegan, *supra* note 61; Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 20, 2020), https://www.nytimes.com/2020/06/06/

decision is a prime example of that trend. It will take some sophisticated political maneuvering, or perhaps threats of police defunding,[73] to change the dynamic so there won't be a need for future *ALADS* decisions. Working together with the public, there is likely a better way to address the need to balance police interests against those of the public. The approach before *ALADS* was woefully inefficient, expensive, inadequate and unfair.[74]

VI. CONCLUSION

After the *ALADS* decision was issued, the California Peace Officers Association (CPOA) issued a statement acknowledging that the decision "finally put to bed the debate about the role of law enforcement agencies in the *Brady* rule."[75] It did not mince words. Noting how the decision affects law enforcement agencies throughout the state, it wrote to its membership: "It seems inescapable that there is a duty upon law enforcement agencies to at least review the personnel records of its officers to determine if there is potential *Brady* material in those records."[76] However, in discussing how such disclosures will be handled, the CPOA statement also noted that the "fight" is likely to continue about whether a *Brady* tip alone is sufficient.[77]

One wonders whether we can arrive at an era where disclosure of information to help defendants and the public will no longer be a

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us/police-unions-minneapolis-kroll.html; Kevin Rector, *Police Reform Advocates Scrutinize Police Unions, Calling Them Obstacles to Reform*, L.A. TIMES (Aug. 18, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-08-18/police-reform-advocates-scrutiny-police-unions; Daniel Trotta, *U.S. Mayors Identify Police Unions as an Obstacle to Reform*, U.S. NEWS (Aug. 13, 2020, 1:52 PM), https://www.usnews.com/news/top-news/articles/2020-08-13/us-mayors-identify-police-unions-as-an-obstacle-to-reform.

73. *See* Jill Cowan, *What to Know About Calls to Defund the Police in California*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/09/us/ca-defund-police.html.

74. As noted by Professor Abel:

> Systems that balance officers' confidentiality interests against *Brady*'s constitutional requirements get it completely wrong. The protections benefit dishonest cops by allowing them to testify and, thus, to continue to work the streets. Meanwhile, these protections harm defendants, who are denied critical impeachment evidence to which they are entitled under *Brady*.

Abel, *supra* note 39, at 807.

75. Gregory P. Palmer & James R. Touchstone, *The California Supreme Court Unanimously Upheld the Disclosure of "Brady Tip Lists" to the Prosecution*, CAL. PEACE OFFICERS ASS'N (Sept. 3, 2019), https://cpoa.org/the-california-supreme-court-unanimously-upheld-the-disclosure-of-brady-tip-lists-to-the-prosecution/.

76. *Id.*

77. *Id.*

"fight." That will take more than a state supreme court case. It will take a movement—a movement where the public and the police are no longer seen as opposing or competing actors. The public took note when the police joined protesters in 2020 in marching for reforms.[78] Police will embrace "equal justice" causes if they are not framed simply as anti-police movements.[79] We are in a critical period where there is an opportunity to change the paradigm from a constant battle between law enforcement's interests and those of the public to a recognition that these interests must be aligned if we are to have confidence in our criminal justice system.

Brady was decided nearly sixty years ago.[80] At the time, it was considered revolutionary,[81] but it has survived and made a momentous change in how criminal cases are handled. The *ALADS* decision and SB 1421 have breathed new life into *Brady*, but their effectiveness still very much depends on those within the prosecutorial and law enforcement communities who have access to the information. They need to step up to ensure that the promise of both the case and the legislation are met. Individual case decisions will never take the place of a sincere, committed effort by those dedicated to fairness to ensure that each and every defendant receives a fair trial.

78. *See* K.C. Baker, *Police Join Protesters in Marches Across the Country: 'Good Cops Are Sick to Their Stomachs'*, PEOPLE (June 1, 2020, 5:50 PM), https://people.com/crime/police-join-protesters-marches-across-country/; Hollie Silverman, *Police Officers Are Joining Protesters for Prayers and Hugs in Several US Cities*, CNN (June 2, 2020, 12:30 PM), https://www.cnn.com/2020/06/02/us/police-protesters-together/index.html; Lisette Voytko, *In Some Cities, Police Officers Joined Protesters Marching Against Brutality*, FORBES (May 31, 2020, 10:42 AM), https://www.forbes.com/sites/lisettevoytko/2020/05/31/in-some-cities-police-officers-joined-protesters-marching-against-brutality/#4b68f3445edb.

79. Brad Polumbo, *Why Support for Criminal Justice Reform Isn't the Same as Being Anti-Police*, U.S.A. TODAY (Sept. 8, 2020, 6:00 AM), https://www.usatoday.com/story/opinion/2020/09/08/criminal-justice-reform-isnt-anti-police-support-both-column/5701614002/ (describing police officers' willingness to embrace reform not colored as "anti-police").

80. Brady v. Maryland, 373 U.S. 83 (1963); *see* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006) ("[B]y explicitly commanding prosecutors to disclose to defendants facing a criminal trial any favorable evidence that is material to their guilt or punishment, *Brady* launched the modern development of constitutional disclosure requirements.").

81. *See* Gershman, *supra* note 80, at 708 (describing the holding in *Brady* as a "revolution in criminal justice").